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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., *Appellants*

v.

DAVID H. KURTZMAN, ET AL., *Appellees*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

BRIEF OF POLISH AMERICAN CONGRESS, INC., ORDER OF SONS OF ITALY IN AMERICA, UKRAINIAN NATIONAL ASSOCIATION, INC., LEAGUE OF UNITED LATIN AMERICAN CITIZENS, SLOVAK CATHOLIC FEDERATION OF AMERICA, CROATIAN CATHOLIC UNION OF U.S.A., AMERICAN SLOVENIAN CATHOLIC UNION, LITHUANIAN ROMAN CATHOLIC ALLIANCE OF AMERICA, HUNGARIAN CATHOLIC LEAGUE OF AMERICA, INC., ANCIENT ORDER OF HIBERNIANS IN AMERICA, INC., GREEK CATHOLIC UNION OF THE U.S.A., UNION SAINT-JEAN-BAPTISTE, CATHOLIC CENTRAL UNION OF AMERICA, UKRAINIAN WORKINGMEN'S ASSOCIATION, AND POLISH ROMAN CATHOLIC UNION IN AMERICA, AMICI CURIAE

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BRIEF AMICUS CURIAE OF POLISH AMERICAN CONGRESS, SONS OF ITALY, ET AL.

INTEREST OF THE AMICI

The *amici curiae* are as follows:

Polish American Congress, Inc. The Congress is a national body, founded in 1944, and representing fourteen organizations whose one million members are of Polish descent. Its headquarters are in Chicago, Illinois. The organization has had a prime interest in promoting education and democratic citizenship.

Order of Sons of Italy in America. The Order embodies 80,000 active members in twenty states, who are persons of Italian birth or descent, regardless of religious faith. The Order has, among its purposes, the supporting of education, civic virtue, and other humanitarian goals, in addition to encouraging the dissemination of Italian culture in the United States. Founded in 1913, the national headquarters is at Philadelphia, Pennsylvania.

Polish Roman Catholic Union of America. The Union is a fraternal organization, founded in 1873, having a membership in excess of 150,000 in 23 states, consisting principally of persons of Polish origin who are of the Roman Catholic faith. Among PRCUA's prime aims, is, and has been, the promotion of Americanism, good citizenship and the sound education of the young. Its principal office is at Chicago, Illinois.

Ukrainian National Association, Inc. Founded in 1894, the Association is a nonsectarian benevolent society consisting of 90,000 members in 460 branches in 29 states and the District of Columbia. Membership is open to any person of Ukrainian or other Slavic extraction. The organization fosters knowledge and preservation of Ukrainian culture and the cause of human freedom. It has always taken a special interest in education. Its headquarters is in Jersey City, New Jersey.

Ukrainian Workingmen's Association. Organized in 1910, UWA, a secular organization, has 24,000 members in seven states. Affording a variety of programs aimed at service to the community and the promotion of brotherhood and American patriotism, it has rendered extensive support to scientific, educational, civic and charitable work, in addition to its fostering of knowledge of Ukrainian history and culture. Its principal office is in Scranton, Pennsylvania.

Slovak Catholic Federation of America. The Federation consists of: First Catholic Slovak Ladies Association,

ennsylvania Slovak Catholic Mens Union, Pennsylvania lovak Catholic Womens Union, The Catholic Sokols, and ie Wreath of the Free Eagle—the total membership being 80,000 persons. Organized in 1911, the Federation has xisted for many humanitarian purposes—among these the nprovement of social conditions among persons of Slovak xtraction and promoting works of education and of charity. t has its national headquarters at Munhall, Pennsylvania.

Croatian Catholic Union of U.S.A. The Union is a raternal society, with a membership of 15,000 persons of roatian extraction in sixteen states. Founded in 1921, it arries on extensive cultural activities. It promotes respect or the independence of the United States of America and as as a specific aim the promotion of education. Its na- ional headquarters is located at Gary, Indiana.

American Slovenian Catholic Union. The organization onsists of 50,000 members in twenty states who are of lovenian origin or descent. It was founded in 1894 as fraternal society and has been active in charitable and ducational endeavors. Its headquarters are at Joliet, llinois.

Catholic Central Union of America. Founded by Amer- cans of German origin in 1855, the organization (no longer "nationality" body) promotes education and works of harity and the protection of civil and religious liberty of itizens. It has a membership of 25,000 in the United States. Its national office is at St. Louis, Missouri.

League of United Latin American Citizens. This or- ganization was founded in 1929 to promote good citizen- hip and service to the country. It has a membership of 150,000 persons, of Mexican origin or relationship, in six- teen states. Its main office is at Laredo, Texas.

Union Saint Jean-Baptiste. Founded in 1900 for bene- ficial, charitable and educational purposes, the Union now has a national membership of 55,000 persons of French origin. Its headquarters is in Woonsocket, Rhode Island.

Greek Catholic Union of the U.S.A. This organization, with a membership of 50,000 persons of Slavonic extraction, was founded in 1893 for a number of humanitarian (including educational) purposes. It is based in Pittsburgh, Pennsylvania.

Lithuanian Roman Catholic Alliance of America. Related to the cultural and educational needs of citizens of Lithuanian ancestry or origin, the Alliance, with national headquarters at Wilkes-Barre, Pennsylvania, was founded in 1886 and today has 8,000 members.

Ancient Order of Hibernians in America, Inc. The Order is a fraternal order, with a national membership of 250,000, devoted to promoting the welfare of individuals of Irish descent in America. It has long fostered an interest in education. Its headquarters is in Indianapolis, Indiana.

Hungarian Catholic League of America, Inc. The League is a fraternal and charitable organization of persons of Hungarian descent. The League has long been active in promoting freedom of education. It has a national membership of 100,000. Its principal office is in New York, New York.

The organizations submitting this brief have a collective membership of two million persons. Indirectly they represent many more millions of persons of European origin or ancestry. Residing chiefly in the great urban centers and industrial cities of the United States, these organizations have long engaged in efforts for the betterment of social conditions of the foreign born, the promotion of the principles of American citizenship, and the enrichment of American life through the contribution of cultural traditions of other lands. While these "ethnic" Americans can be found in various social-economic strata, a large number of them help constitute the backbone of the Nation's labor force.

The *amici* organizations have a vital and substantial interest in education, both public and nonpublic. As tax-

payers, their members faithfully fulfill their duty under law to contribute to the support of the public schools in their states. Many of these citizens have children enrolled in those schools, while many others of them, in the exercise of a fundamental liberty to choose non-state education, have children enrolled in nonpublic schools.

The *amici* organizations have never before come together nationally to present a brief to this Court. They now do so because the meaningful enjoyment of fundamental liberty in education is plainly at stake in this litigation.

SUMMARY OF ARGUMENT

The *amici* believe Pennsylvania's Act 109 to be constitutional. Only one question raised by Appellants is of any substance: whether the Act, on its face, is a law respecting an establishment of religion. It is clear that, measured by the principles which this Court has laid down in *Board of Education* v. *Allen*, 392 U.S. 236 (1968) and *Walz* v. *Tax Commission*, —— U.S. ——, 25 L. Ed. 2d 697 (1970), the Act does not violate the Establishment Clause. While the Act has no effect of advancing religion, it does serve the vital public purpose of advancing the secular education of the young. The fact that the Act does this through nonpublic institutions (including those which are religiously related) is a prime reason *for* its constitutionality: *the Act promotes educational, cultural and religious freedom.*

ARGUMENT

I. ACT 109 IS A POSITIVE AID TO EDUCATIONAL, CULTURAL AND RELIGIOUS FREEDOM

The Appellants seek to create a myopic focus upon the Act: it is invalid simply and solely because of the religious relationship of the publicly accredited schools which may participate under it. Thus the Appellants seek to deflect all attention from what is one of the most obvious of all the vital contributions of the Act: namely, to aid

human freedom in its intellectual, cultural and religious dimensions.

Parents have a right, under the Constitution to expose their children to religious and cultural values of their own choosing:

> "Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to prepare him for additional obligations." *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534 (1925).

The First Amendment is the legal basis of that right, and "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Thomas* v. *Collins,* 323 U.S. 516, 530 (1944). To maintain otherwise would be to grant to public officials, *in principle,* unthinkable powers of ideological and cultural formation of children. The concept of equality of educational opportunity has been often—and properly—seen in terms of freedom of opportunity to be admitted to public schools. That is not, however, the whole scope of freedom of educational opportunity. A vital aspect of that freedom is the *meaningful* opportunity to choose nonpublic schools.

The "ethnic" groups in the United States not only support public education; they have indeed been major contributors to the building of the public school system in the United States. They have, moreover, never aligned themselves with those who have fostered racism, whether in public education or otherwise. But they are peculiarly

aware of the long campaign which has been prosecuted, even to this hour, through immigration quotas, through discrimination in employment and housing, and through political pressures relating to education, to promote a *pseudo* "American culture" in which "foreign influences" and indeed religious integrity are discouraged. The statute struck down by this Court in *Pierce, supra,* was the result of a campaign to "Americanize" education in Oregon launched in 1920 by the Imperial Council, A.A.O. Nobles Mystic Shrine and certain related groups. Their purpose was stated on the official ballot when the compulsory education bill was before the electorate. The sentences are instructive at the present hour:

> "Our nation supports the public school for the sole purpose of preservation.
>
> "The assimilation and education of our foreign-born citizens in the principles of our government, the hopes and inspiration of our people, are best secured by and through attendance of all children in our public schools.
>
> "We must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.
>
> "Mix the children of the foreign-born with the native-born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American." Oregon School Cases Complete Record, 732 (1925).

The most extensive and learned brief *amicus curiae* to be filed in the *Pierce* case was that written by Louis Marshall on behalf of the American Jewish Committee. He expressed his fears as to what the practical results might be of state absorption of all education:

> "Recognizing in the main the great merit of our public school system, it is nevertheless unthinkable that public schools alone shall, by legislative compulsion

> rather than by their own merits, be made the only medium of education in this country. Such a policy would speedily lead to their deterioration. The absence of the right of selection would at once lower the standards of education. If the children of the country are to be educated in accordance with an undeviating rule of uniformity and by a single method, then eventually our nation would consist of mechanical Robots and standardized Babbitts." *Id.* at 615.

But the most trenchant criticism of the statute and of the philosophy of those who defended it Marshall reserved for the conclusion of his brief. The point is most pertinent in view of charges made today that church-related schools are "divisive". Backers of the statute had stated:

> "Our children must not under any pretext, be it based upon money, *creed* or social status, be divided into antagonistic groups, cliques or cults there to absorb the *narrow views of life* as they are taught." *Id.* at 621. (Emphasis supplied).

This view Marshall castigated:

> "Here those who send their children to private and parochial schools because of their creed are charged with constituting antagonistic groups and as absorbing 'narrow views of life'. In other words, parents who are anxious for the future welfare and happiness of their children, and who seek to dedicate them to moral, ethical and religious principles, are denounced for sending their children to private and parochial schools, because, forsooth, the views of life which they there absorb are characterized as 'narrow'.
>
> "What does that mean but an attempt on the part of the protagonists for this law to sit in judgment upon their fellow-citizens whose ideals differ from theirs! How does such a mental attitude differ from that which prevailed when governments sought to enforce uniformity of religious beliefs and punished nonconformists as criminals?" *Id.* at 621, 622.

Almost a half century later, this debate of 1925 is revived in the instant proceeding. Today, vast changes have taken

place in the role of government in this country, in the dimensions of governmental spending, and in personal taxation. The arguments once used in an attempt to employ statutory law as a direct weapon to coerce all parents to accept public education for their children are now used in an attempt to employ the law of the Constitution as a similar weapon. The position of many parents would then come to this: (1) the state's compulsory attendance law requires that children be placed in schools—public or nonpublic; (2) many parents, due to no other cause than conscience, wish to have their children educated in nonpublic schools; (3) the combined effect of inflation and of the state's taxation is rendering the choice of a nonpublic school meaningless; (4) partial state aid to nonpublic education, very carefully limited to secular instruction and under sound public controls is (under such views as Appellants urge) constitutionally impermissible. The end result would be that these parents would enjoy educational liberty in nothing but theory and be denied it in actual fact.

This denial of true educational opportunity is seen most clearly when serious consideration is given to the public interest dimension in education. Educational pluralism* is essential to the welfare of the state itself. While much scholarly opinion has advocated educational pluralism as a useful means of providing relief from the alienation and

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* The term, "pluralism", as used herein, does not encompass the bogus "pluralism" advanced under the banner of a supposed "freedom of choice", by advocates of racial segregation. Act 109, read in conjunction with other applicable Pennsylvania law, does not permit the schools participating thereunder to exclude or discriminate against anyone. See Appendix in this case, pp. 72-77. The *amici* organizations, which have been leaders in fighting discrimination and in promoting good citizenshp, strongly discountenance any legislation which would be aimed at promoting havens for racism. In this connection it should be pointed out that nonpublic schools have played an important role in stablizing many neighborhoods in difficult transitional times.

bitterness marking contemporary American society,* or purely educationally in allowing for differing instructional approaches to children of unique background,** or as furnishing a better opportunity for humanism in education as opposed to emphasis upon technical competence,*** or as providing more effective acculturating agencies in American society,**** it is plain that the most vital function of educational pluralism is in the fostering of freedom of conscience. Nonpublic schools have historically played a significant role in America in nurturing religious freedom. They have, in fact, constituted an example of it. Today they become essential to religious liberty as the only channels of general education wherein the *right to receive* religion may be realized. Many parents hold the view that an educational environment which is religiously neutral is not acceptable to their children. Many commentators are of the view that no religious neutrality is possible in any general process of the educating of the young.* For those whose conscience demands religious schooling, the nonpublic school, with its dual function, is indispensable. Public aid to nonpublic education poses no threat to a public educational system worthy of public confidence. Indeed aid such as that afforded to nonpublic education under Act 109 serves public education not only financially by helping

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* See Cleary, *Are We Encouraging Political Cynicism in Our Schools?* 51 PHI DELTA KAPPAN 549-553 (June, 1970).

** See Stodolosky and Lesser, *Learning Patterns in the Disadvantaged*, HARVARD EDUCATIONAL REV. (Fall, 1967) pp. 546-593; L. Thompson and A. Joseph, THE HOPI WAY (1944).

*** See F. Littell, *Sectarian Protestantism and the Pursuit of Wisdom: Must Technological Objectives Prevail?* in Erickson, PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS, 73, 81 (1969).

**** See W. Warner and L. Srole, THE SOCIAL SYSTEMS OF AMERICAN ETHNIC GROUPS (1945).

* M. Konvitz, RELIGIOUS LIBERTY AND CONSCIENCE, 51-72 (1968); W. Ball, *Religion and Public Education: The Post-Schempp Years*, in Sizer, RELIGION AND PUBLIC EDUCATION, 144-163 (1967).

retard the economically forced transfer of large nonpublic school populations to the public schools, but also by providing a creativity in education beneficial to all schools. Nor is any fragmentation of society spurred by legislation such as Act 109. America has long had a large segment of its population in nonpublic schools. The record shows that the graduates of these schools have been contributors at all levels of society and that the nonpublic schools have been a unifying influence in a society which has not yet fallen prey to the illusion that a state educational monopoly creates social unity. American history, as the *amici curiae* are particularly qualified to testify, reveals that the unity of American society has always been found, not in the suppressing of cultural and religious diversity, but in the harmonious living together and working together of individuals and groups in all of their essential distinctiveness.

II. PENNSYLVANIA'S ACT MEETS THE TEST OF HAVING (A) A SECULAR LEGISLATIVE PURPOSE (B) NO PRIMARY EFFECT THAT ADVANCES RELIGION

In *Allen* this Court restated the test it had pronounced in *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), that legislation, to withstand the strictures of the Establishment Clause, must have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion". *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968).

a. The Act's Stated Secular Purposes Are Realized in Its Operation

Act 109 was declared by the Pennsylvania General Assembly, which enacted it, to be directly responsive to the educational crisis in that state. While the Appellants attack the good faith of the legislature in making that declaration, any further question of the public purposes of the Act has been foreclosed by the subsequently published report of the Pennsylvania Department of Education show-

ing the achievements, on behalf of education, realized by the Act following two years of actual operating experience under it. The Department's report released July 1, 1970, states, in part:

> "Relative to the second conclusion, we have been apprised by both the nonpublic school administrators and various interested citizens and organizations of the Commonwealth regarding the substantial educational advance which this epochal program has marked. Because of the quality incentives and program stimulation written into PNESEA, evidence of upgraded nonpublic education in some needed instances has been noted resulting in much favorable comment."

The rational basis for, and correctness of, the legislature's declaration of purpose is also seen in the fact that, as the third year of operation of the Act begins, the Commonwealth has afforded aid to around 500,000 children per year, for two years, by supporting their instruction in the basic fields of mathematics, modern foreign languages, physical science, and physical education. It is wholly incorrect to say, as do Appellants, that the state does not really aid education by paying for instruction under the Act. The Act specifically requires of the participating nonpublic schools conformance to a standard not even required of the public schools: the attainment of a satisfactory level of pupil performance in the supported subjects. That such attainment is written into the Act as a condition precedent to payment is proof that, with respect to all the reimbursed schools, the state is in fact supporting education—indeed, education of good quality.

Thus, the Court may find the secular legislative purpose of the Act, not merely in legislative declaration, but in the Act's purpose-as-achieved in actual operation in Pennsylvania.

b. The Act Does Not Advance Religion

The Act falls clearly within the constitutional pattern upheld in *Allen*. If Act 109 violates the Establishment Clause, so did the New York Textbook Loan Act. Constitutionally, there is no difference between the two pieces of legislation, unless it be said that Act 109 is closer to the non-establishment principle than was the New York act. While Appellants seek to escape the effect of the *Allen* decision, they are driven to technical distinctions which do not result in constitutional difference:

1. Act 109 provides funding; the New York act provided only books. Several comments upon this point will reveal that it is insubstantial. First, the Appellants' insistence upon a strict "no aid" doctrine means that the form of aid makes no difference: any benefit to *or through* a church-related institution is forbidden. The New York act provides benefits costing the state in excess of $5 million per year. Second, a grant of physical property can be more of a benefit to the donee and more of a detriment to the donor than a grant of money. Third: there is really not a grant under Act 109, but only reimbursement: the nonpublic school actually makes the only "grant" involved; that it recoups from the state upon satisfaction of the conditions stated.

2. Act 109 benefits institutions; the New York act benefited only children and parents. This is the shallowest of all the Appellants' arguments. This, as the court below correctly stated, places form over substance. The Court, in *Allen*, after describing the program, went on to say: "Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to the schools". 392 U.S. at 243, 244. At the end of this sentence the Court appended a footnote which pointed out that under the New York program, private schools were permitted to store the books on their premises, and that it was these schools (and not the children) which presented

the requests for the books to the Board of Education. The Court, in its footnote, concluded: "So construing the statute, we find it in conformity with the Constitution, for the books are furnished for the use of individual students and at their request." 392 U.S. at 244. This seems to mean either: (a) that if it can be shown that the student ultimately benefits, it is not material that he receives the benefit through the institution he attends, or (b) that the critical question is whether there was an act, upon the individual student's part, of asking for the book in a formal manner, and a furnishing of the book to him, individually, in response to that request. This latter meaning appears untenable. First, it qualifies the basic concept of the *Allen* test: if it can be proved that education of the student was advanced through the legislation in question, how material is it that he went through the motions of a request? The fact of request can obviously have no bearing upon the question of whether his education was advanced.

Did the Court intend to imply that any program whereby funds or books or financial benefit went to a school, would be unconstitutional? To say that the *Allen* test is met only in the circumstance in which the "child", or "student", or "individual", has been, in some formal way, an earmarked beneficiary, and in which the institution has, so to speak, dematerialized, and appears to play no role in the process of education (which is, after all, the process being supported by the legislation) seems unrealistic.

The decision of the Court as well as its essential rationale, are inconsistent with such view. First, the Court plainly focused upon the presence, in the case, of religious institutions—saying that the program in question did not provide "an unconstitutional *degree of support*" therefor. 392 U.S. at 244. Secondly, as has been noted, the Court recognized the role of these institutions, not only as partial administrators of the program of

publicly-supplied benefits, but as custodians thereof. Thirdly, the Court pointed out that these publicly-supplied benefits (the books) "are critical to the teaching process". 392 U.S. at 245. Fourthly, it specifically stated that "parochial schools" perform the task of "secular education", a task which from the context, the Court clearly saw as lying in the public interest. 392 U.S. at 247.

3. Act 109 involves grants; the New York act involved only loans. This also fails as a meaningful distinction. The plaintiffs in *Allen* attacked the New York act as providing for a "permanent loan", which they said was no different from a grant. As has been seen, Act 109 involves no grant but instead reimbursement, or payment by the state of contract debts.

4. Act 109 involves teacher salaries; the New York act involved only textbook cost. The plaintiffs in *Allen* (who are substantially the same plaintiffs as in this case) attacked the New York program as an aid to one inseparable teaching process, in which book and teacher were all one instrumentality. They thus attacked the New York program as in fact a teacher-support program. The Court upheld the program, stating that it could not hold, as a matter of law, that all teaching in a religiously-affiliated school is sectarian. Absent proof, it would in fact assume that there is teaching in such schools which is *secular*—not sectarian. It recognized, in other words, the secular function of such schools. Now, if there is *teaching* in these schools which is secular (and thus publicly supportable), does that function become non-supportable because of the *profession* of the teacher—a private and personal commitment which that teacher has made? To affirm such a proposition would plainly be to attack the citizenship of such teacher, because then, *not the function which she performs but the fact of her religious profession*, becomes the sole test of her eligibility to participate in a public program. Such a proposition would deny qualification to

any ordained minister or rabbi teaching in a public school (of whom there are many). The very notion is abhorrent.

It is clear that if the New York program upheld in *Allen* did not violate the Establishment Clause, neither does does Act 109.

The Appellants' assertion that Act 109 advances religion (and indeed that that is its primary effect) can be viewed as nothing less than an argument in favor of an *establishment of secularism.* Their essential position is this: that no public funds may be expended to aid *any* function—secular though the function may be—where the agency performing that function is religiously related. This position has a two-pronged effect: *first,* it would economically wipe out the contribution of all church-connected social service institutions; *second,* it would substitute a regime of secularism in all welfare (including educational) work.

CONCLUSION

It is submitted that Pennsylvania's Act 109, a statute useful to educational progress, serves vital public purposes and in no wise offends the Constitution of the United States.

Respectfully submitted,

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